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January 12, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby
Counter TW-A325
Washington, D.C. 20554

Re: ***CC Docket No. 96-115, Telecommunications Carriers' Use of Customer Proprietary Network and Other Customer Information; CC Docket No. 96-98, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; CC Docket No. 99-273, Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended***

Notice of Ex Parte Communication

Dear Ms. Salas:

On January 11, 2001, Lois Pines and the undersigned, counsel to InfoNXX, met in separate meetings with Commissioner Gloria Tristani and her Legal Advisor Deena Shetler; with Commissioner Harold Furchtgott-Roth and his Legal Advisor Rebecca Benyon; with Jordan Goldstein, Legal Advisor to Commissioner Susan Ness; and by telephone with Anna Gomez, Legal Advisor to Chairman Kennard; and on January 10, by telephone with Mr. Greg Cooke of the Common Carrier Bureau, urging prompt action by the Commission in the above-captioned proceeding. We reviewed the grounds for Commission authority to require access to directory listing information by independent directory assistance (DA) providers and the need for access at nondiscriminatory and reasonable rates, terms and conditions. We also discussed how Commission action could affect other independent DA providers.

It is important to note that while independent DA providers that offer call completion may be deemed competitive LECs entitled to access to incumbent LECs' directory listings under Section 251(b)(3) of the Communications Act of 1934, as amended, Sections 201(b) and 202(a) provide the Commission with independent authority to grant access to directory listings for other DA providers.[1] In the *Local Competition Second Report and Order*, the Commission required ILECs to provide paging carriers – which are not covered by § 251(b)(3) – with nondiscriminatory access to telephone numbers. Paging carriers, the Commission reasoned, compete with other CMRS providers – which are covered by § 251(b)(3) – and should not be the only entities subject to discriminatory fees. Thus, the Commission concluded that charging them discriminatory fees would violate the prohibition against unreasonable discrimination in § 202(a) and also would constitute an "unjust practice" and an "unjust charge" under § 201(b). *See* Notice of Proposed Rulemaking, *Provision of Directory Listing Information under the Communications Act of 1934, As Amended*, CC Docket No. 99-273, FCC 2227, at ¶ 189 (Sept. 9, 1999) ("*Notice*"). The Commission is correct in its tentative conclusion that "[j]ust as paging carriers could not compete without access to numbers . . . non-carrier directory assistance providers cannot compete without access to directory assistance equal to that provided to [carriers] pursuant to section 251(b)(3)." *Id.* at ¶ 190.

Sections 201 and 202 govern the reasonableness and nondiscrimination of all rates and practices in connection with communications services, including the rates for directory listings obtained by a carrier or a carrier's agent under Section 251(b)(3). Section 201(b) requires just and reasonable rates and practices and Section 202(a) prohibits rates and practices that are unreasonably discriminatory. These sections governing the Commission's general rate regulation authority apply to rates (and rate determination) under Section 251, whether or not one of its specific provisions refers to "reasonable" rates and whether or not their authority is specifically invoked. As the United States Supreme Court made clear in *AT&T Corp. v. Iowa Utilities Board*, "the grant [of rulemaking authority] in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251, and 252, added by the Telecommunications Act of 1996." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999). Thus, the Commission has the authority to determine the just and reasonable rates and practices by which a LEC provides nondiscriminatory access to its directory listings under § 251(b)(3). Though the Commission may not have sufficient information in the record at this point to determine whether any specific rate is reasonable, it nonetheless has authority in the future to make that determination in the context of a complaint or other appropriate action.

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[1] Section 201(b) provides that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign communication by wire or radio], shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful." 47 U.S.C. § 201(b). Section 202(a) makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device." 47 U.S.C. § 202(a).

Recognition and explanation by the Commission that Sections 201 and 202 provide a reasonableness touchstone for ILEC rates and practices relating to directory listings would be helpful to the range of companies in the competitive DA business because Section 251(b)(3)'s nondiscrimination safeguard is an imperfect mechanism for assuring that independent DA providers are charged just and reasonable rates. It may become necessary to flesh out the parameters of nondiscriminatory rates in a complaint proceeding, and such a proceeding would be greatly facilitated by an understanding of how the Commission believes Sections 201 and 202 provide an overarching reasonableness requirement.

Finally, the Commission should ensure that the nondiscriminatory requirement is meaningful. As previously established in the record, rates for competing carriers sometimes are contained in side letters to ILEC/CLEC agreements and are unavailable to other carriers seeking to ensure that they receive the same rates.[2] Requiring ILECs to disclose to competing carriers the rates at which the sell directory listings to other carriers certainly appears to be a reasonable practice in connection with the provision of communications services required under Sections 201 and 202. Though some have cautioned against a too expansive reading of the "practices" covered by Sections 201 and 202,[3] in this case, the regulated practice is related to the provision of DA information, which is plainly an "adjunct to basic" service that the Commission has held is part of telecommunications services. In short, Section 251(b)(3) establishes a nondiscrimination safeguard, and Sections 201 and 202 establish that the Commission has authority to regulate in furtherance of that safeguard.

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office, and a copy is being submitted each to the individuals listed below.

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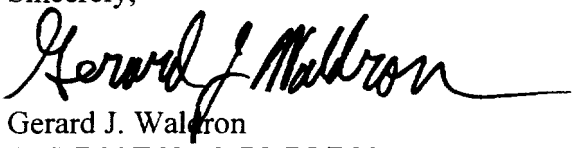
[2] *See* InfoNXX Ex Parte Letter at 2 (Jan. 3, 2001) (discussing difficulty of discovering rates paid by competing carriers).

[3] *See Joint FCC/FTC Policy Statement For the Advertising of Dial-Around And Other Long-Distance Services To Consumers*, Dissenting Statement of Commissioner Harold Furchtgott-Roth, 15 FCC Rcd 8654, 8761 (2000) (arguing that common carrier advertising is not one of "practices" covered by Section 201(b) and that Commission wrongly expanded its jurisdiction in regulating common carrier advertising).

Please direct any questions regarding this notice to the undersigned.

Sincerely,



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Ms. Rebecca Benyon
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Mr. Greg Cooke